

VU Research Portal

The Perplexities of Modern International Law [Review of: S. Rosenne (2004) The Perplexities of Modern International Law]

Werner, W.G.

published in

Netherlands International Law Review
2006

DOI (link to publisher)

[10.1017/s0165070x06244930](https://doi.org/10.1017/s0165070x06244930)

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Werner, W. G. (2006). The Perplexities of Modern International Law [Review of: S. Rosenne (2004) The Perplexities of Modern International Law]. *Netherlands International Law Review*, *LIII*(3), 508-512.
<https://doi.org/10.1017/s0165070x06244930>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

Netherlands International Law Review

<http://journals.cambridge.org/NLR>

Additional services for *Netherlands International Law Review*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



S. ROSENNE, The Perplexities of Modern International Law, Martinus Nijhoff Publishers, Leiden 2004, xxvi + 471 pp., € 121 / US\$ 163. ISBN 90-04-13692-4.

Wouter G. Werner

Netherlands International Law Review / Volume 53 / Issue 03 / December 2006, pp 508 - 512
DOI: 10.1017/S0165070X06244930, Published online: 14 December 2006

Link to this article: http://journals.cambridge.org/abstract_S0165070X06244930

How to cite this article:

Wouter G. Werner (2006). Review of Oliver Jütersonke 'Morgenthau, Law and Realism' Netherlands International Law Review, 53, pp 508-512 doi:10.1017/S0165070X06244930

Request Permissions : [Click here](#)

BOOK REVIEWS

R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge 2005, xxviii + 360 pp., UK£ 60 / US\$ 110. ISBN 0-521-82474-5.
DOI: 10.1017/S0165070X06214931

In *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Robert Cryer, Senior Lecturer in Law at the University of Nottingham, surveys the development of international criminal law and examines its legitimacy as a system. Despite historical and structural challenges, he considers that international criminal law constitutes a 'regime'. The second part of his interesting study evaluates the regime's commitment to 'the rule of law' by examining the problem of 'selectivity' in international criminal law.

Cryer uses 'selectivity' in two ways, which distinguishes his work from other accounts that examine the weaknesses of international criminal law. He refers, in one sense, to selectivity in terms of the definitional reach of international criminal law: which rules and principles constitute part of the international criminal system. In this context, Cryer devotes his final two chapters to detailed considerations of definitions of certain international crimes, and also of general principles of international criminal liability and defences to such crimes. But in a second sense, Cryer has in mind selective prosecution and enforcement of international crimes, which he terms selectivity *rationae personae*. Both manifestations of selectivity, Cryer argues, imperil the legitimacy of the international criminal law regime because they challenge the regime's status as one adhering to the 'rule of law'. When definitional selectivity arises, the rule of law is threatened because the body of international criminal law to be applied is variegated or uncertain. When selectivity *rationae personae* exists, that body of law is inconsistently applied.

Fundamental to the first part of Cryer's book is the notion that international criminal law has developed into a 'regime'. Cryer borrows from international relations theory and follows Steven Krasner's definition of a regime as one exhibiting a 'set of implicit or explicit principles, norms, rules and decision making procedures around which actors' expectations converge in a given area of international relations' (p. 125).¹ It must be said that this importation from international relations theory seems somewhat lost in a work otherwise devoted to legal analysis. Cryer refers to the literature on regimes only sporadically, and uses the concept itself in different ways. He acknowledges the numerous criticisms that have been made of regime theory (pp. 125-126), noting that its focus on effectiveness excludes moral aspects and questions of legitimacy. Given that the second half of Cryer's study critiques the international criminal legal system on the basis of its legitimacy in adhering to a rule of law ideal, his preferred definition seems a curious choice.

Cryer begins by traversing the history of prosecutions of international crime, at both the national and international level, from ancient Greece to the present day. Although he makes no claim to originality, Cryer's coverage of the historical material is lucid and cogently assembled, if somewhat synoptic. One of the themes of the chapter is that some of the problems which beset earlier permutations of war crimes trials have had remarkable longevity and persist today (p. 21). Cryer reminds us that states have been, and remain, unwilling to engage in active prosecution of their own nationals (p. 35). Those accused of war crimes will often attempt to impugn the forum's legitimacy as a substantive defensive strategy (p. 19). The majority of war crimes go unpunished, and the historical response to the commission of atrocity has been silence, or only partial redress (p. 72).

Chapter 2 examines various mechanisms vital to the development of international criminal law enforcement, focusing on the role of national courts. Cryer devotes particular attention to the exercise of jurisdiction. While criminal jurisdiction remains predominantly exercised on a territorial or nationality basis, it is the place of – and definition of – universal jurisdiction in the international order which has generated particular controversy. Cryer is cautious to delineate what does not constitute an exercise of this contentious form of jurisdiction. It has been argued that treaties requiring states to prosecute offenders present on their territory create universal jurisdiction.² Cryer correctly concludes that such treaties do not truly establish universal jurisdiction but instead extend or pool traditional bases of jurisdiction amongst those states party to them to achieve a common purpose; unless there is a collateral basis for jurisdiction in customary international law, nationals of non-party states would not be bound by the extension of jurisdiction (p. 81).³ Traditionally, universal jurisdiction existed only for the crime of piracy. Cryer concludes, however, that today universal jurisdiction 'probably covers war crimes, crimes against humanity and genocide' (p. 87). This view is persuasive but is not without controversy; the discussion would have been enhanced by a more thorough exploration of the application of universal jurisdiction to the prosecution of these crimes.⁴

Universal jurisdiction raises the threat of selectivity *rationae personae* – selectivity of enforcement – because of its putatively political character (p. 83). But the supposed risks associated with universal jurisdiction seem somewhat overwrought, and it must be borne in mind that, for diplomatic and logistical reasons, this form of jurisdiction is only seldom deployed.⁵ Moreover, in states which afford discretion and independence to their prosecutorial bodies, the potential for politically motivated prescriptions of jurisdiction is considerably reduced. In this context, Cryer could have usefully referred to the set of preconditions carefully elaborated by Judges Higgins, Kooijmans and Buergenthal in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, which, if adhered to by states, would restrain capricious assertions of universal jurisdiction.⁶

At a definitional rather than a prescriptive level, Cryer suggests, universal jurisdiction raises more substantive issues of selectivity. It raises definitional problems because it

can expose an accused to an unpredictable forum: the accused can be prosecuted in any country. As Cryer notes, this should not be problematic if there is definitional convergence across jurisdictions on the core crimes (p. 97); but the varying definitional ambit of international crimes, which Cryer explores in the second part of the book – not to mention the differences in criminal procedure and due process guarantees across various jurisdictions – suggests that such global convergence will prove elusive.

Chapter 2 also contains a stimulating discussion of the domestic incorporation of international crimes. The harmonisation of international crimes will be fundamental to the establishment of a true regime of criminal international law. However, it remains the case that states which require domestic legislative implementation before international crimes can be prosecuted will often not incorporate those crimes in similar ways. Various domestic political or legal factors may colour a state's domestic implementation of international crimes, leading to inconsistency across jurisdictions. Cryer cites the example of states' implementation of the Geneva Conventions as one such example of inconsistent and inadequate implementation (pp. 119-120). Further scope for uncertainty exists when the elements of international crimes come to be interpreted and applied by national courts. In the *Barbie* case,⁷ the French Court of Cassation went beyond customary international law to hold that a crime against humanity must be committed in furtherance of a common plan instigated by a state practising a hegemonic ideology – a requirement extraneous to the customary definition of crimes against humanity (p. 122). Similar definitional problems concerning crimes against humanity afflicted the Canadian Supreme Court's decision in *R v. Finta*.⁸ Cryer concludes that the absence of authoritative definitions of international crimes has impeded the development of international criminal law as a system of determinate and unified content (p. 123).

Cryer's discussion of national developments in international criminal law, and his detailed analysis of whether there is a duty on third states to prosecute international crimes, would have been enhanced by a discussion of immunities, which he mentions only briefly in the context of *jus cogens* (pp. 113-114). The operation of national immunities has been a significant barrier to national prosecution of international crimes, highlighting the friction between a horizontal legal order of sovereign equality and a nascent vertical regime of international criminal law enforcement.⁹ The extent to which the regime of international criminal law enforcement is able to penetrate national legal orders will often turn on whether immunity operates as a bar to prosecution. The question of when the prosecution of international crime should override immunity is one of extreme theoretical interest and practical importance, and it is striking that Cryer does not address this issue.

Chapter 3 discusses the ways in which international criminal institutions interact in the international system and with national courts. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) enjoy concurrent jurisdiction, and primacy, over national courts and, pursuant to Article 25 of the UN Charter, and Articles 29 and 28 of the ICTY and ICTR Statutes, respectively, compel UN member state co-operation. This is a vertical, rather than bilateral, obligation; and it is coercive rather than co-operative.¹⁰ Indeed, the ICTY Appeals

Chamber has held that the obligations flowing from Article 29 of the ICTY Statute (and, by analogy, the concomitant obligations of Art. 28 of the ICTR Statute) are obligations *erga omnes* (p. 133).¹¹ Nevertheless, the legal power of the Tribunals has in practice been circumscribed by their lack of enforcement apparatus and reliance on state assistance in arresting and transferring suspects (p. 137).

The ICTY and ICTR are temporary international criminal law enforcement measures, and, according to Cryer, can be considered only as rudiments of a regime. With the entry into force of the Rome Statute of the ICC, a 'fully fledged' regime of international criminal law has arrived (p. 146). Only a few years after its commencement, to describe the ICC as a comprehensive regime that, in Cryer's words, imposes 'substantive rules which structure expectations' (p. 143) seems overly sanguine. This initial optimism is surprising, as Cryer is certainly alert to the shortcomings of the ICC model. Theoretically, it is certainly arguable that the ICC constitutes a regime of substantive rules; in practice, the problems created by non-States Parties, the role of the Security Council and disincentives to co-operate may well be significant.

The ICC certainly expands the international criminal legal system through its use of complementarity: it is intended to operate only when international norms cannot be enforced in national courts. Normatively, complementarity persuades national actors to embed international norms in their domestic legal orders. In this area, the domestic effects of the Rome Statute may calibrate expectations and guide behaviour. The operation of the complementarity mechanism in the Rome Statute could potentially lead to the greater harmonisation of international criminal law. Cryer examines this harmonisation by surveying judicial consideration of the Rome Statute in international jurisprudence, and the incorporation of the Rome Statute in domestic legal orders. He concludes that the Rome Statute 'now appears to be forming the default definitions of international crimes when new documents are drafted' (p. 184). It may also form the default instrument for judicial interpretation of statutes or treaties which call for interpretation of international crimes.¹²

In the first and second parts of his book, Cryer devotes particular attention to the role of the Prosecutor, who holds a central place in the ICC Statute (and indeed in international criminal law) both diplomatically and legally. The experience of the *ad hoc* Tribunals demonstrates the curious, somewhat schizophrenic, role of an international prosecutor, who must function as both lawyer and diplomat, often simultaneously.¹³ The right balance between these two roles – between the twin goals of effectiveness in the international arena and the legitimate application of legal norms – will be crucial towards securing state co-operation and assistance, and vitally important in the deployment of the Prosecutor's *proprio motu* powers, which allow investigation without a referral (subject to confirmation by a pre-trial chamber).¹⁴ The Prosecutor's independent powers of investigation were strongly criticised by the United States in the debates at Rome, which feared that *proprio motu* powers would open the Prosecutor to political influence and the potential for capricious prosecution.¹⁵ But as Cryer notes, the level of oversight is high and the Prosecutor's discretion is 'carefully circumscribed and

reviewable' (p. 226).¹⁶ The development of guidelines for the application of the Prosecutor's powers will provide a crucial contribution towards enhancing the international legitimacy of the ICC.¹⁷ Similarly, indicia to determine what constitutes an inability or unwillingness genuinely to investigate or prosecute will be vital to the structuring of expectations and the legitimate operation of the complementarity mechanism.¹⁸

Part 2 of Cryer's study evaluates this system of international criminal law enforcement from the perspective of definitional selectivity and selectivity *rationae personae*. Both forms of selectivity undermine the regime's claim to function as a system adhering to the rule of law. The phrase, 'rule of law', is one in frequent use. Cryer has in mind Lon Fuller's understanding of the concept: as a system of general norms that exhibit certain characteristics of stability, consistency and equality (p. 195).¹⁹ This is a rigorous standard of evaluation for a regime that is very much in its early stages of international institutionalisation and doctrinal elaboration. Cryer's method of evaluation indicates that he is working within a 'liberal' conception of international criminal justice; he sees the international legal order as an outgrowth of its domestic counterpart. Similarly, he does not question international criminal law's emphasis on the responsibility of individuals in situations of mass atrocity; he refers only in passing to state and collective responsibility for international crime.

Chapter 4 examines selectivity *rationae personae* by considering selective enforcement throughout the development of the international criminal law regime. National practice indicates that states have been extraordinarily reluctant to subject their own nationals to the ambit of international criminal law when it is possible to immunise them from its reach. Prosecutions have generally been limited to the crimes of a past regime, or of foreigners. On the international plane, international tribunals have raised similar problems of selectivity. At Nuremberg, alleged violations by the Allies were overlooked; at Tokyo, it was not contemplated that the bombings of Hiroshima or Nagasaki would be prosecuted. Of course, selectivity of enforcement occurs in relation to domestic crime. Scarcity of resources dictates that a state cannot prosecute every alleged transgression of the criminal law; prosecutorial discretion must be exercised. Such discretion remains acceptable if it is exercised consistently and follows preconceived policy. The same should also be true on the international plane. But international criminal law seems coloured by politics because of the open texture of the international system, and because the effective enforcement of criminal norms by international tribunals relies vitally on the political will of states. While Cryer's discussion contains much reference to the practice of tribunals and the varying definitions of crimes, one could have hoped for greater analysis of what constitutes an acceptable exercise of discretion in international criminal law.

In turning to various examples of selectivity *rationae personae*, Cryer devotes particular attention to the ICTY Prosecutor's response to allegations that NATO forces had committed war crimes in 1999. In response to calls to investigate NATO's bombing campaign, in 1999 then ICTY Prosecutor Louise Arbour set up an internal committee to deliver a report outlining whether a formal investigation should be undertaken; in 2000,

after the internal report was completed, the new ICTY Prosecutor, Carla Del Ponte informed the Security Council that, based on the findings in the report, she would not further investigate NATO actions. Cryer questions whether the decision not to prosecute was due to the level of seriousness of the alleged crimes, and suggests that 'the decision not even to investigate is out of kilter with past ICTY practice' (p. 218). The report itself has been subjected to intense criticism, and led to speculations about the levels of NATO pressure placed on the ICTY.²⁰ While these accusations have not been substantiated, certain aspects of the report have been strongly criticised and Cryer is probably correct that the Office of the Prosecutor's approach left it open to charges of selectivity (p. 220).

The controversy over whether to investigate NATO's bombing was not the first time issues of selectivity have arisen at the ICTY. In the *Čelebići* proceedings before the ICTY Appeals Chamber, one of the accused, Esad Landžo, argued that he, as a Bosnian Muslim, had been selectively prosecuted specifically to counter suggestions that the Tribunal demonstrated bias against Serbs, and to give an appearance of 'even-handedness' to the Office of the Prosecutor's policy.²¹ This argument was rejected by the Appeals Chamber, which found that the Prosecutor's strategy did not discriminate towards Landžo; the heinousness of the crimes he was alleged to have committed brought his prosecution within pre-existing prosecutorial policy.²²

Chapters 5 and 6 focus on definitional selectivity. Chapter 5 examines definitions of crimes; chapter 6 examines principles of liability and defences. Both chapters highlight the tensions between effectiveness and legitimacy. Cryer's contention is that a state will perceive the system of international criminal law as 'safe' or 'unsafe', depending on whether or not that state's nationals are subject to international criminal jurisdiction. Where their nationals are at direct risk of investigation and prosecution, states will attempt to circumscribe tightly the rules of international criminal law. Where a state's nationals are not at risk, the definitional ambit will be more open-ended.

Historical practice seems to bear this out. The architects of the Charters of the Nuremberg and Tokyo Tribunals were determined that nationals of the Allies not be subjected to the scrutiny of those laws, and could afford to be expansive in their definitions of the crimes to be tried. The same is true of the Statutes of the ICTY and ICTR: because of their limited temporal and geographical jurisdiction, powerful states did not attempt to circumscribe the law to be applied.

Negotiation of the Rome Statute, by contrast, involved states in drafting crimes to which their nationals could potentially be subjected. The participating states therefore saw it as their role not to accelerate the development of international criminal law but to restate comprehensively existing international crimes. It must also be borne in mind that the Rome Statute – in contrast to the *ad hoc* Tribunals, established under authority of the Security Council – was the outcome of a long and complex negotiating process. It is natural that it appears more conservative in its definitional reach, because of its negotiating history and the numerous concessions required to bring it to life.

There are idiosyncrasies in certain definitions of crimes in the Rome Statute that reflect the imperatives of political compromise, and Cryer explores these with clarity and insight. He notes the contextual requirement for the prosecution of genocide in the ICC elements of crimes, which narrows the definition contained in the Genocide Convention by requiring that the conduct 'took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction' (pp. 246-247).²³ Cryer's analysis contains a thorough discussion of the shifting contours of a definition of crimes against humanity. The ICTY and ICTR have had significant latitude in developing the elements of crimes against humanity through judicial elaboration. As a threshold requirement, the jurisprudence of the ICTY requires a 'widespread or systematic attack', even though this language is nowhere used in the statute.²⁴ Negotiations for the Rome Statute turned on whether the 'widespread' and 'systematic' elements of the 'attack' constitute a cumulative or disjunctive test. The result was a compromise; the definition effectively requires both widespread *and* systematic elements. But as Cryer correctly notes, this is a retrogressive step in terms of customary international law; the *ad hoc* Tribunals have repeatedly stressed the disjunctive nature of the test.²⁵ The higher threshold requirement is consistent with Cryer's categorisation of the ICC as an 'unsafe' tribunal – one in which the countries which drafted the elements of crimes can be exposed to prosecution (p. 255). It also raises significant doubts about the possibility of increasing convergence, as national courts reaching for international interpretation may be torn between substantially different definitions. This is regrettable, as the elements of crimes against humanity have traditionally led to considerable confusion at a national level.²⁶

Chapter 6 examines principles of liability and defences. These topics are probably too complicated to be treated wholly successfully in a single chapter. Cryer notes that controversy over certain principles of liability in the *ad hoc* Tribunals has focused on those modes of participation not expressly mentioned in the Statutes (p. 311). The Tribunals have had considerable discretion to formulate various principles relating to collective participation in international crimes. Unfortunately, Cryer's study contains scant analysis of the questionable reach of the 'joint criminal enterprise' or 'common purpose' doctrine as a mode of international criminal liability, which seeks to found liability on the formulation and execution of a commonly held criminal plan.²⁷

Cryer's discussion of command responsibility, though brief, is nuanced in its attention to the differences between customary international law and the formula contained in the ICC Statute. He draws attention to the lack of clarity that has afflicted jurisprudence in this area. In deciding upon separate regimes – and separate standards of *mens rea* – for military and civilian command responsibility in the ICC Statute, State Parties have sought to define with care the circumstances of criminal liability for command responsibility that may arise. This survey of defences and principles of liability leads Cryer to conclude that certain elements of the Rome Statute are more restrictive formulations than required under customary international law.

Prosecuting International Crimes is an ambitious and stimulating contribution to

the burgeoning literature on international criminal law. One of its many strengths is the close attention to the varying definitional ambits of international crimes, which serve, overtly or obliquely, to destabilise the effectiveness and legitimacy of international criminal law. The breadth of Cryer's study is significant, and many areas demand further amplification; but his account is an important attempt to trace how international criminal law has developed as a system. Equally important is his attempt to analyse how the legitimacy of the system has been and continues to be challenged.

*James Upcher*²⁸

1. S. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in S. Krasner, ed., *International Regimes* (Ithaca, Cornell University Press 1983) p. 1.

2. See M.P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position', 64 *Law and Contemporary Problems* (2001) p. 67; G. Bottini, 'Universal Jurisdiction after the Creation of the International Criminal Court', 36 *NYUJILP* (2004) p. 503 at p. 521.

3. See also D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *Journal of International Criminal Justice* (2003) p. 618 at p. 623.

4. In *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, for example, the judges exhibited markedly different views on the scope of universal jurisdiction. See the Separate Opinion of President Guillaume, para. 12; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 65; Separate Opinion of Judge Koroma, para. 9; Dissenting Opinion of Judge Van Den Wyngaert, para. 59.

5. For a list of such factors which account for state reluctance, see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Dissenting Opinion of Judge Van Den Wyngaert, para. 56.

6. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 59.

7. *Fédération nationale des déportés et internés résistants et patriotes et autres v. Barbie*, Court of Cassation, Judgment of 20 December 1985, 78 *ILR* 136.

8. *R v. Finta* [1994] SCR 701.

9. See D. Akande, 'International Law Immunities and the International Criminal Court', 98 *AJIL* (2004) p. 407; A. Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *EJIL* (1999) p. 237; R. van Alebeek, 'The Pinochet Case: International Human Rights Law on Trial', 71 *BYIL* (2000) p. 29; P. Sands, 'International Law Transformed? From Pinochet to Congo ...?', 16 *Leiden JIL* (2003) p. 37.

10. R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (Oxford, Oxford University Press 2004) p. 118.

11. *Prosecutor v. Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108bis (29 October 1997), para. 26.

12. See, for example, *SRYYY v. Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 *ALR* 394, where the Full Court of the Federal Court of Australia held that the definitions of crimes contained in the Rome Statute were appropriate definitions of the phrases 'war crime' and 'crime against humanity', in Art. 1F(a) of the Convention Relating to the Status of Refugees, 189 *UNTS* p. 137. Done at Geneva on 28 July 1951, entered into force 22 April 1954.

13. See Kerr, op. cit. n. 10, at chapter 8.

14. See Rome Statute of the International Criminal Court, 2187 *UNTS* p. 3. Done at Rome on 17 July 1998, entered into force 1 July 2002, Art. 15.

15. See A.M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *AJIL* (2003) p. 510 at pp. 513-514.

16. Art. 53(1) of the Rome Statute sets out various factors that the Prosecutor shall consider in deciding to initiate an investigation.

17. See Danner, loc. cit. n. 15, at pp. 541-550; The ICC Prosecutor has issued draft guidelines which are currently undergoing revision. See <www.icc-cpi.int/library/organs/otp/draft_regulations.pdf> (accessed 10 March 2006).

18. See the Informal Expert Paper, 'The Principle of Complementarity in Practice', <www.icc-cpi.int/otp/complementarity.html> (accessed 3 April 2006), Annex 4, for a list of relevant indicia.

19. L.L. Fuller, *The Morality of Law*, rev. edn. (New Haven, Yale University Press 1969) chapter 3.

20. See P. Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia* (College Station, Texas A & M University Press 2004) pp. 131-139.

21. *Prosecutor v. Delalić, Mucić, Delić and Landžo (Čelebići case)*, Appeal Judgment, Case No. IT-96-21-A (20 February 2001), para. 612.

22. Ibid., at para. 614: 'The Appeals Chamber considers that, in light of the unquestionably violent and extreme nature of these crimes, it is quite clear that the decision to continue the trial against Landžo was consistent with the stated policy of the Prosecutor to "focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or other wise extremely serious offences".'

23. Cf., Convention on the Prevention and Punishment of the Crime of Genocide, 78 *UNTS* p. 277. Done at New York on 9 December 1948, entered into force 12 January 1951.

24. A 'widespread or systematic attack' is an overt requirement of the ICTR Statute: Art. 3.

25. See, for example, *Prosecutor v. Kunarac et al.*, Appeal Judgment, Case No. IT-96-23 & IT-96-23/1-A (12 June 2002), paras. 93, 97; *Prosecutor v. Akayesu*, Trial Judgment, Case No. 96-4-T (2 September 1998), para. 579; *Prosecutor v. Blaškić*, Appeal Judgment, Case No. IT-95-14-A (29 June 2004), para. 101; *Prosecutor v. Limaj et al.*, Trial Judgment, Case No. IT-03-66-T (30 November 2005), para. 183; *Prosecutor v. Stakić*, Appeal Judgment, Case No. IT-97-24-A (22 March 2006), para. 246.

26. See, for example, the *Barbie* case, *supra* n. 7.

27. See S. Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity', 2 *Journal of International Criminal Justice* (2004) p. 606; V. Haan, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia', 5 *International Criminal L Rev.* (2005) p. 167. The theory was first elucidated in the *Tadić* Appeal Judgment, which stated that, while Art. 7(1) primarily referred to the physical perpetration of a crime by the defendant, it also encompassed 'participation in the realization of a common design or purpose'. See *Prosecutor v. Tadić*, Appeal Judgment, Case No. IT-94-1-A (15 July 1999), para. 188.

28. Barrister and Solicitor of the Supreme Court of Victoria, Australia; formerly Assistant Legal Officer, International Criminal Tribunal for the Former Yugoslavia, The Hague, The Netherlands. The views expressed in this review are those of the author alone.

J.-M. HENCKAERTS; L. DOSWALD-BECK, eds., *Customary International Humanitarian Law*, boxed set of 3 hardback books, Cambridge University Press, Cambridge 2005, 5066 pp., UK£ 300. ISBN-10:0521539250 | ISBN-13:9780521539258.

doi: 10.1017/S0165070X06224938

In Spring 2005, the International Committee of the Red Cross (ICRC) launched the study *Customary International Humanitarian Law*. Edited by Jean-Marie Henckaerts and Louise Doswald-Beck, this monumental work containing three volumes and more than 5000 pages sets forth 161 rules of international custom governing armed conflict. Even the most neutral description of the project is bound to impress. The preparation of the study took almost ten years. It involved national research teams, international research teams and an ICRC research team, together examining practice and *opinio juris* in some fifty countries and forty armed conflicts. Add to that a Steering Committee and a group of academic and governmental experts invited to comment on drafts of the study, and the result is an Acknowledgements section which reads like the society pages of international humanitarian law (IHL).

The primary goal of the study is to capture the current state of customary IHL. Special emphasis is put on the law governing non-international armed conflict, since the codification of this part is only rudimentary (see Introduction, pp. xxviii-xxix). While the ICRC considers the study 'primarily a work of scholarship' and therefore 'respected the academic freedom both of the report's authors and of the experts consulted', it believes 'that the study does indeed present an accurate assessment of the current state of customary international humanitarian law' (Foreword, p. xi). The ICRC has in fact presented the study as a product of the institution rather than an academic work of two of its staff members, *inter alia*, organizing a series of conferences around the world to discuss the findings of the study.¹ This embrace of its findings by the ICRC certainly enhances the weight of a study that is already of great importance in its own right.

Both the editors² and the ICRC (p. xvii) have expressed the hope that their work will not be taken on face value, but will prompt indebt discussion on various aspects of customary IHL. In this, they will undoubtedly succeed. The study has already given rise to serious debate in various fora about the role and content of customary IHL, its relationship to treaty law and the methodology of its formation and ascertainment. These fora include the conferences mentioned above, law journals³ and the internet.⁴ National and international courts are also taking notice of the study.⁵

Needless to say, a project of this magnitude always leaves room for improvement and generates criticism on different levels. Professionals who focus on the practice ascribed to their own states will undoubtedly find an omission or inaccuracy here and there. On a more general level, some minor imperfections may be noted in the choice of sources and the way they have been processed. For example, one may question whether recommendations of the Women's International War Crimes Tribunal 2000, a 'people's tribunal' organized by NGOs, belong in a study purporting to set out the current state of

customary IHL (e.g., Vol. II, pp. 3536 and 3593). With all due respect for the value of that initiative, I would think not, since the whole purpose of this 'tribunal' is to venture into territory where states refuse to go.

Other entries are potentially relevant but of limited value to the reader for the rather general way in which they have been noted. I certainly believe that 'in 1979, in a meeting with the ICRC, the leader of an armed opposition group stated that he was in favour of executing POWs who attempted to escape' and that 'in 1984 and 1988, an armed opposition group told the ICRC that it generally refrained from executing prisoners in reprisal and only pronounced death sentences on the basis of at least three witness accounts' (Vol. II, p. 2400). I will leave aside the more fundamental question whether such statements of armed opposition groups can be qualified as relevant practice at all, and concentrate solely on the form in which they are brought to us. What are these concise statements worth if we do not have more information about the armed opposition groups meant, and the context in which these statements were made? Do these entries refer to one and the same armed opposition group, or to different ones? Did these statements reflect actual practice, or did these groups violate their position expressed to the ICRC on a daily basis? Highly relevant, but we do not know. We will not easily find out either, for the footnotes to these entries, and various other ones in the study, only refer to 'ICRC archive document' without any date or specification. While this anonymity may be an understandable consequence of the ICRC's policy of neutrality and confidentiality, it does limit the value of the information provided. Still, these minor shortcomings do not significantly diminish the value of the study as a whole.

The editors have wisely tried to avoid some of the most contentious topics of customary IHL, such as the question whether IHL grants any leeway to persistent objectors (p. xxxix). Wisely, because their study shows that there are many facets of customary IHL which merit discussion apart from the most apparent bones of contention. To name only one: are there 'specially affected States' in IHL? The editors seem to think there are (pp. xxxviii-xxxix). While they note that all states have a legal interest in requiring respect for IHL and therefore the practice of all states must be considered, they do take the stance that there are specially affected states in IHL. Thus, they state that countries which have been identified as being in the process of developing blinding laser weapons are specially affected concerning the question of the legality of such weapons. Likewise, they consider that '[i]n the area of humanitarian aid, States whose population is in need of such aid or States which frequently provide such aid are to be considered "specially affected"' (p. xxxix). Even: '[w]ith respect to any rule of international humanitarian law, countries that participated in an armed conflict are "specially affected" when their practice examined for a certain rule was relevant to that armed conflict' (p. xxxix).

The editors are not alone in their liberal embrace of the concept of specially affected states in IHL. In a review of these contentions, two other writers go so far as to call the United States a specially affected state in IHL in the broadest terms: 'A rule would be hard, if not impossible, to regard as having taken on customary status were a State such

as the United States opposed to it.’⁶ They support this rather improbable statement with the United States being ‘the outstanding laggard in signing IHL treaties and ... therefore most likely to be affected by the confirmation of conventional rules as customary law..., very active abroad militarily and ... at the forefront of developing new weapons technology’.⁷

I seriously question all these interpretations of the concept of specially affected states. In fact, it may be asked whether there are specially affected states in IHL at all. It is easy to see how the concept of specially affected states is useful when discussing delimitation of the continental shelf: some states have a continental shelf to delimit while other states do not and, one may assume, never will. There is an aspect of permanency there which is lacking in IHL. Belligerent states, one may hope, are the peace makers of tomorrow. Occupied states may be the occupiers of tomorrow. Customary rules develop slowly and should be stable enough to withstand such changing of positions. Moreover, one would think that it is irreconcilable with the very character of IHL to grant specially affected status to the manufacturers of certain dubious weapons, just as it would have been problematic at least to grant South-Africa specially affected status with regard to the question of apartheid. Yet, I see it as a strength of the ICRC study, not a weakness, that it provokes such discussions.

All in all, Henckaerts, Doswald-Beck and their many, many contributors have produced a more than impressive study on customary IHL. In fact, so impressive that one may question the ICRC’s decision to publish this study with Cambridge University Press. Would it not better have suited the ICRC’s mandate and mission to make the results of this important study available freely online? The ICRC publishes several useful IHL databases online,⁸ and this would have been a great addition. Such general access would certainly have benefited the dissemination and development of customary IHL, and perhaps it can be offered in the future. Until that time, the paper version of *Customary International Humanitarian Law* deserves the full attention of everyone who is seriously interested in international humanitarian law.

Ward Ferdinandusse

Public Prosecutor

Dutch Department of Prosecutions

1. See for reports of a few of those conferences <www.rodekruis.nl/picture_upload/Upload%20document%20Cust%20Law%20Conf.pdf> (The Hague), <www.wcl.american.edu/hrbrief/13/2balgamwalla.pdf?rd=1> (Washington, DC), <www.apcml.org/documents/conf_brief_220605.pdf> (US Naval War College) (all last visited 1 June 2006). See also a summary of the study by Jean-Marie Henckaerts in 87 *International Review of the Red Cross* (2005) no. 857, pp. 175-212.

2. See Henckaerts, loc. cit. n. 1, at p. 197.

3. See D. Turns, ‘Weapons in the ICRC Study on Customary International Humanitarian Law’, 11 *Journal of Conflict and Security Law* (2006) p. 201; T. Meron, ‘Editorial Comment: Revival of Customary Humanitarian Law’, 99 *AJIL* (2005) p. 817; and M. MacLaren and F. Schwendimann, ‘The New ICRC Study on Customary International Humanitarian Law as an Exercise in the Development of International Law’, 6 *German LJ* (2005) p. 1217.

4. See, e.g., <kennethandersonlawofwar.blogspot.com/2005/11/my-initial-reactions-to-icrc-customary.html>.

5. See, e.g., *R (Al-Jedda) v. Secretary of State for Defence* [2005] EWHC 1809 (Admin) (12 August 2005) and *Prosecutor v. Stakić*, Appeals Chamber, Judgment, IT-97-24-A (22 March 2006).

6. MacLaren and Schwendimann, loc. cit. n. 3, at pp. 1232-1233.

7. Ibid., at p. 1232.

8. See <www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Info_resources:IHL_databases?OpenDocument>.

S.C. NEFF, *War and the Law of Nations: A General History*, Cambridge University Press, Cambridge 2005, xii + 443 pp., UK£ 55 / US\$ 95. ISBN 0-521-66205-2.

DOI: 10.1017/S0165070X06234934

Whereas the wars in Iraq and Afghanistan and the sharp upsurge of terrorism over the past decade definitely suggested a concerted response on the part of the legal discipline and a comprehensive review of the laws of war and of such pertinent concepts as self-defence and reprisal, it all seemed as if, for a while at least, international lawyers were benumbed by the very enormity of political circumstance. With hindsight, the great majority by far of that avalanche of comments launched over past years on the numerous acutely topical issues of war all seemed to labour from distinct myopia. In spite of heated academic debate scholars, as if mesmerized by the sheer vehemence of political response to the cascade of tumultuous events exemplified by 9/11, somehow had lost sight of the broader perspective.

It is only fairly recent that academics managed to once more disentangle themselves from the stranglehold of immediacy. The work here under consideration is a case in point – and must be hailed as such. Along with recent works such as *The Morality of War* (2005), a highly instructive overview of ‘classical and contemporary readings’ or, be this from a somewhat different angle, Richard Tuck’s critical edition of Grotius’ *chef d’oeuvre* (2005), Stephen Neff’s *War and the Law of Nations* is to be welcomed as an extremely useful instrument to literally help put current events back in perspective. Two previous monographs – *Friends But No Allies; Economic Liberalism and the Law of Nations* (1990) and notably *The Rights and Duties of Neutrals: A General History* (2000) – stand out to suggest the author’s eminency to deal with the subject-matter at hand.

If the present reviewer has often been puzzled by the apparent disinterest or debonair dismissal of history at the hand of international lawyers Dr Neff is a welcome exception. Witness the opening lines of his chapter on the history of international law in the second edition of Malcolm D. Evans’s manual (2006), where he actually refers to this situation as an ‘intellectual scandal’ and a ‘remarkable state of affairs, probably without parallel in any other academic discipline’. With some qualification perhaps, the present reviewer

is inclined to agree wholeheartedly with this obvious *cri du coeur*. To most modern internationalists legal analysis, in principle, represents an eminently abstract process, far removed from either the idiosyncracies of post-modern historical science or the myriad of complexities, often of an all too incidental and seemingly ephemeral nature, that constitute the object of historical research. To all likelihood, the progressively technical nature of legal scholarship has somewhat alienated students and practitioners from the roots and, at heart, social nature of the discipline.

To that extent at least Dr Neff's monograph is a must for all involved. Numerous topical issues of the law and persistent non-licets are dealt with here in their true historical perspective and illustrated with a wealth of well-researched material. Thus, the bewildering meanderings of that protean principle of self-defence are traced back to their origins and followed from close quarters all along the parallel (if forever winding) avenues of scholarly speculation and state practice. The same holds good for the various measures mostly ill-defined in legal parlance as 'short of war'. Many recent off-hand commentators on these issues which, so far, have hardly been thoroughly investigated, could have availed themselves enormously from Dr Neff's pages or, upon reading his treatise, would have made up their minds to hold their tongue and clip their words.

Dr Neff's historical narrative runs perfectly straightforward throughout. In line with the author's primary goal as pronounced in the prelims of the book, it focuses on 'legal conceptions of war, rather than on the substantive or technical aspects of the law of war'. The structure of the book mirrors this approach in its almost classical simplicity. Having pointed out the growing consciousness, identifiable independently in various ancient societies, of a distinct relationship between war and justice, Dr Neff evaluates the, again, very deliberate and purposeful historical process by which war came gradually to be considered as, if anything, an instrument of law enforcement, from there to discuss the subsequent deployment of elaborate just war theories (up to 1600).

In the second part of the book Dr Neff elaborates the various challenges posed to the above-mentioned views of war by (notably) Hobbesian thought and the *Leviathan* itself (1600-1815). This is followed by an analysis of the heyday of war as the perfectly legitimate instrument of state policy, featuring a routine and ritual all of its own, in the century following Vienna, when formal criteria had come to replace moral ideas of perfection and *laissez-faire* was the universal battle-cry. The story is then carried on towards the resurge of medieval just war concepts (if cloaked differently) after Versailles, highlighting the heroic but doomed uphill fight of interbellum lawyers to trim the claws of the dragon. The rich narrative is drawn to a close in the evaluation of the many new riddles that, along with the old ones, have faced the UN over the past 60 years, ranging from civil wars and liberation movements to, recently, international terrorism.

One of the merits, indeed charms, of Dr Neff's approach throughout is precisely his indefatigable pinpointing of the *Auseinandersetzung* of doctrine and state practice (that 'wary partnership') as the key to the interpretation of the historic quest that is the subject of his narrative, and his description of how the law incessantly moulded war, as much

indeed as war kept moulding the law in that endless interplay of 'profound thought and brutal practice'. Nowhere perhaps is this thesis more convincingly advanced – and indeed more pertinent to topical debate – than in Dr Neff's painstaking appraisal of how international lawyers over the past century were all too long deluded by their less than realistic perception of society into claiming their (inevitably Pyrrhic) triumph over war as a tool of state policy; how, in a way, by cornering *Realpolitiker*, they themselves suggested the latter's subsequent invocation, and indeed abuse, of that of old sacrosanct principle of self-defence.

In all this, Dr Neff's style is clear-cut enough, at times even laconic. His reasoning is terse, his conclusions are sound, even if, as duly acknowledged by its author, within the compass of a work of a mere 400 pages, the treatment of complex issues such as the hallowed just-war theories of the so-called 'classics' must needs be somewhat sketchy – and, one may add, at the hand of the Anglo-Saxon scholar, whether in approach or accents, not necessarily wholly in line with the evaluation by continental academics in, say, Haggenmacher's tradition.

All this in no way detracts from the many merits of Dr Neff's 'pioneering expedition' and his fascinating analysis of the phenomenon of war as such, of the fundamental legal conceptions felt of old to be clinging to it, and of the forever shifting ideas concerning its legal nature and status. In the present reviewer's appraisal, there are just two critical remarks to be made to impair, if only all too slightly, Dr Neff's highly instructive monograph, and these refer to the opening and concluding chapters of the book. In the opening pages, Dr Neff presents an impressive panorama of the origins and sources of the laws of war, encompassing the Asian (notably Chinese), Arabic (notably Islamic) and Indian (Buddhist) traditions. All this has become something of a mantra among legal historians. However, this 'universalist' approach is not followed up in subsequent chapters, when non-Western sources are hardly taken into account anymore and focus is conveniently narrowed down to the eminently Western perspective. With hindsight, therefore, these early glimmerings of wisdom, however instructive in themselves, remain relative *Fremdkörper* which do not make themselves felt as the narrative advances and, with the possible exception of Islamic law, have no bearing whatsoever on Dr Neff's major theses. To be sure, most if not all works of similar purport labour from the same deficiency and Dr Neff, definitely, is not to be blamed more than any of his colleagues for this sadly unsatisfying state of affairs, which otherwise is due mostly to the persistent lack of reliable and comprehensive in-depth research into non-Western sources. Unfortunately, ours are still early days for an overall review of the subject-matter from the truly intercultural perspective.

The other critical note refers to the closing pages of the book. Here one is struck by precisely the opposite situation: by the sheer wealth of semi-digested material, the status of the narrative in the concluding paragraphs is reduced to a descriptive rather than analytical tale – and not surprisingly so, one should perhaps add. Dr Neff's work offers the perfect backdrop, no less and no more, for our forever urgent addressing that equally tantalizing and elusive enigma, that metamorphic chimera which keeps harassing man

and which, at the end of the day, is perhaps, if nothing else, the reflection of his own ambiguous nature.

Dr Arthur Eyffinger
The Hague

S. ROSENNE, *The Perplexities of Modern International Law*, Martinus Nijhoff Publishers, Leiden 2004, xxvi + 471 pp., € 121 / US\$ 163. ISBN 90-04-13692-4.

DOI: 10.1017/S0165070X06244930

This book grew out of the lectures delivered by Rosenne at the 2001 General Course on Public International Law of the Hague Academy.¹ It is, therefore, not surprising that reading *The Perplexities of International Law* feels a bit like attending a series of lectures. Rosenne takes his readers through a selected number of topics, providing an overview of the most important legal questions, structuring legal material, discussing state practice and the development of international law and repeatedly cautioning against unrealistic expectations of the power of law in international affairs. Occasionally Rosenne also adds personal notes, for example where he refers to his long career as legal advisor to the Israeli government or where he describes how he first read the text of the UN Charter as a soldier in Egypt, ready to be sent to Burma. The book can thus be described as an advanced course in some selected topics of international law, delivered by a writer who builds on decades of practical experience.

The book discusses, successively, the unity of international law, where to find international law, the position of courts and tribunals, the use of force, humanitarian law, human rights law, international personality, maritime spaces, air-, outer- and cyberspace, treaties, responsibilities and remedies and the UN system. The chapters are well researched and contain solid introductions to a variety of areas of international law. However, they also raise some more general questions. There are, after all, other well researched and interesting advanced introductions to international law, that more or less cover the topics discussed by Rosenne. So what is it that makes this book different from other introductions to public international law? What is it that this book wants to say about the perplexities of modern international law? What is the perspective that informs the structure of the book, the selection of the topics and the ways in which the topics are discussed? Throughout the book, at least two possible answers to these questions are suggested.

The first is that the deeper-lying *problématique* of the book is the fundamental transformation of international law that took place since the late 19th century. In the introduction, Rosenne argues that, with the World Wars, the regional, local and civil wars and the Holocaust, the 20th century has witnessed the ‘collapse of the regime

based on the Peace of Westphalia of 1648' (p. 3). The central place of this transformation is reflected in the structure of the book. In the first substantive part of the book, Rosenne takes up three major developments in international law that can be regarded as responses to the atrocities of the Second World War: (1) the prohibition of the use of force, together with a system of collective security; (2) international humanitarian law and (3) international human rights law. Where traditionally these topics appear in the latter parts of textbooks,² for Rosenne these developments symbolize such an important transformation that they are dealt with right after the introductory chapters.

Interestingly, however, Rosenne also immediately downplays the importance of the changes that took place in the international legal order. At the end of the day, Rosenne holds, international law is still a law of co-ordination between sovereign states, lacking clear rules of identification (p. 15). Thus, while the introduction professes the collapse of the Westphalian system, the concluding chapter informs the reader that the core of 'Westphalia' is still standing: 'The core of international law today as it always has been since the Peace of Westphalia is the independent sovereign State, and the heart of that is *sovereignty*' (p. 454). This state-centric approach is visible in the way in which Rosenne discusses several specific topics, e.g., in his denial of the power of international organizations to create general international law or in his emphasis on human rights as a law 'between States and made by States' (p. 202). In this context it is regrettable that the book does not engage in a serious debate with those who have drawn different conclusions from the fundamental changes in the international legal order. Good examples can be found in the 1990's Hague Academy Courses of Simma and Tomuschat.³ Both Simma and Tomuschat acknowledged the enduring relevance of state sovereignty. However, they also held that the transformation of international law had moved the international order beyond a law of co-ordination towards a more encompassing 'constitutional' framework for the international society. In similar (or perhaps even more radical) reading of international law was offered by the International Tribunal for the Former Yugoslavia in the *Tadić* case. The Tribunal spoke of 'the impetuous development and propagation ... human rights doctrines' that had

'... brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.'⁴

Of course, such readings of international law raise many questions. Such questions, however deserve to be taken up, especially if one believes, as Rosenne does, that 'the century just ended has seen the greatest transformations of human society in all recorded history' (p. 1).

The importance of the transformations in international law is further downplayed by Rosenne's emphasis on the role of politics, especially in relation to the use of force. In

line with realistic readings of the attempts to outlaw war, Rosenne argues that decisions on the use of force are generally within the realm of politics rather than law and often taken without or against legal advice. Given the world of conflict and crises to which the Charter provisions on international security are to be applied, Rosenne repeatedly warns against rigid, overtly literal readings of this body of law. What is more, he believes that the inability of the international community to effectively regulate the use of force casts 'a shadow over all the other achievements – and there are many – in the progress of international law since the Second World War' (p. 112).

The second possible perspective offered by Rosenne is in the title of the book: the perplexities of modern international law. In this context, it is important to underline that for Rosenne this phrase has a very particular meaning:

'The perplexities follow from conviction that universal peace will become a reality when we have a workable, rational, balanced and accepted system of international law and competent, impartial and appropriate instruments to enforce it when necessary, that is in times of crisis. The world has not yet reached that state. That is what it is trying to find' (p. 2).

This quote is interesting because it conveys two messages at the same time. It links the development of international law to an ultimate ideal and pictures the world as searching for a realization of this ideal. The idealistic element is mirrored in the final part of the book, where Rosenne presents his lesson to the readers. Here, Rosenne quotes from De Visscher's critique of the formalism inherent in the pure theory of law. Such formalism would not only obscure the bearing of power on international law, but '... most of all, it has made men lose sight of the final justification for all law, namely the human ends of power which alone can impose upon the State, by the universal assent which they command, a moderating conception of power' (p. 456).⁵

However, Rosenne adds an important note of caution: since international law has not (or, to quote correctly: not yet) reached the end state of universal peace and international lawyers should not pretend otherwise. In a world of ever-looming conflict and political contestation, Rosenne argues, lawyers should refrain from formalistic or overtly idealistic readings of international law. Instead, he advances a contextual approach that situates legal rules in their institutional, social and political context and pays due regard to the object and purpose of specific rules.

The critique of formalism also figures prominently in Rosenne's discussion on the 'sources' of international law.⁶ Rosenne approaches the problem where to find law from the perspective of the practicing lawyer who is asked for advice from a government. In this way, the purpose for which the advice was sought and the conceivable responses to a legal position become guiding in the search for and interpretation of legal material. Such a functional approach rules out black letter interpretations in favor of policy-oriented, contextual readings of international law. A few times, Rosenne even seems to take pride in not offering a general theory of philosophy of international law. International lawyers do not need to engage in 'philosophical speculation' (p. 26), Rosenne argues, because

'governments do not want legal advisors as their legal advisers' (p. 2). The latter may be true (perhaps even a truism) but this does not say much about the importance of theoretical reflection in international law as such. After all, Rosenne's functionalism too is based on a set of assumptions regarding the nature of the international legal order, the proper role of lawyers and the ways in which valid legal arguments can be produced. As was set out above, such underlying assumptions appear where he discusses the evolution of international law, its core presumptions, the ultimate aim of world society or the methodology that lawyers should adopt. In that sense, Rosenne's book has more theory to offer than he seems willing to admit.

From the foregoing it can be inferred that international law's perplexity operates at different levels. It is visible in the proliferation of its subjects, its fields of regulation as well as in the rise of different judicial organs. Rosenne's book takes due account of these developments, for example where he discusses new and complicated topics of international law such as cyberspace or the regulation of cloning. At a deeper level, perplexities are visible in the tension between international law's universal pretensions and the politically divided and legally still highly decentralized world in which those pretensions are to be realized. This tension runs through Rosenne's book, for example where he discusses bilateralism in treaty law or warns against naïve readings of the UN Charter. A third source of perplexity is the nature and identity of the international legal order. Rosenne assures his readers that deep-down the modern legal order is still a law of co-ordination between sovereign states. However, he also examines the major transformations that took place in international law during the 20th century; transformations that have induced other writers to adopt different perspectives on the nature of international law. As the above mentioned *Tadić* case demonstrates, such alternative readings may have an impact on the practice of international law as well. Finally, perplexities can be witnessed in international law's uneasy position between morality and power. In Rosenne's book this tension is illustrated by his discussion of the ambition of international law and the role of international lawyers. The ultimate aim of international for Rosenne is nothing less than universal peace, based on an effective rule of law. However, Rosenne also stresses that in his view lawyers can only contribute to the realization of this ideal if they leave formalism and abstract moralism behind, face the role power and adopt a functional, approach towards international law; if they operate as policy-oriented moderates of power.

Wouter G. Werner
Vrije Universiteit Amsterdam

1. S. Rosenne, 'The Perplexities of Modern International Law', 291 *Recueil des cours* (2001) pp. 9-471.

2. See, for example, the following textbooks: A. Cassese, *International Law* (Oxford, Oxford University Press 2005); M. Dixon, *Textbook on International Law* (Oxford, Oxford University Press 2005); M.N. Shaw, *International Law* (Cambridge, Cambridge University Press 2003).

3. C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil*

des cours (1993-IV) pp. 195-374; B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des cours* (1994-VI) pp. 217-384; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des cours* (1999) pp. 9-438.

4. *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

5. Rosenne quotes: C. De Visscher, rev. edn., *Theory and Reality in Public International Law* (Princeton, NJ, Princeton University Press 1968) p. vii.

6. Note that Rosenne holds the term 'sources' to be misleading, since, in his view it confuses 'non judicial factors that give to international law its quality of law with the elemental factors from which a principle or rule of international law can be traced' (p. 26).